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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-381

FERRIS JACOB ALEXANDER, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 15, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The petitioner, Ferris Jacob Alexander, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on July 7, 1971, affirming petitioner's conviction in this proceeding.

OPINION BELOW

The opinion of the Second Circuit, which is not yet reported, is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

The judgment of the Second Circuit was entered on July 7, 1971. Petitioner's timely petition for rehearing, together with his petition for rehearing *en banc,* was denied on August 16, 1971. This petition for certiorari has been filed within 30 days from the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a single conspiracy prosecution under 18 U.S.C. § 371, severance is required as to a magazine retailer, charged as a co-conspirator for having received interstate shipments of obscene material, where (a) the record shows a conglomeration of distinct and separate interstate shipments, (b) there is no evidence that he knew of the other retailers involved or of the nature, extent and operation of the scheme to make such interstate shipments, and (c) such knowledge can be imputed to him only by surmise and speculation.

2. Whether 18 U.S.C. § 1465, which provides criminal sanctions for one who "knowingly transports in interstate or foreign commerce [any obscene matter] for the purpose of sale or distribution," applies to a magazine retailer who merely purchases and receives large interstate shipments of obscene material, particularly where there is no other evidence that before receipt he induced, aided or caused the transportation.

3. Whether, in a federal obscenity prosecution, it is error:

(a) To preclude the defense from submitting publicly available material similar to the alleged obscene

material, on the issue of contemporary community standards.

(b) To charge the jury that children and the young are within the community whose standards are to be determined.

(c) To charge the jury that the prurient interest of sexual deviates may be considered where there is no proof that the dominant theme of the material as a whole appeals to any such group or that the material was primarily disseminated to any such deviate group.

(d) To decline to charge the jury that guilt under 18 U.S.C. § 1465 requires proof that the defendant knew the material transported in interstate commerce was obscene before it was so transported.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18, § 371, provides in part:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

United States Code, Title 18, § 1465, provides in part:

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more

than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable."

STATEMENT OF THE CASE

In October of 1969 a 13-count indictment was returned in the Southern District of New York charging 15 individuals, including the petitioner herein, with one count of conspiring to transport obscene material in interstate commerce for the purpose of sale and distribution, in violation of 18 U.S.C. § 1465, and 12 substantive counts for violation of that statute.

Eight of the 15 defendants were brought to trial, the others being severed or transferred. District Judge MacMahon presided at the jury trial. On October 28, 1970, the jury returned guilty verdicts on various counts against five of the defendants, while entirely acquitting three defendants.[1] The petitioner Ferris Alexander was found guilty on the conspiracy count (Count 1) and on two of the substantive counts (Counts 7 and 10); not guilty verdicts were returned in favor of the petitioner on two other substantive

[1] At the conclusion of its case in chief, the Government conceded that it had not proved five of the substantive counts, as well as two of the overt acts specified in the conspiracy count. In addition, three substantive counts were dismissed as to the defendant Carole Portela.

counts (Counts 2 and 5). Petitioner was thereafter fined $10,000 on the conspiracy count, $5,000 on each of Counts 7 and 10, and was ordered confined for concurrent prison terms of 18 months on each count. The Second Circuit affirmed the convictions of petitioner.

According to the Government's theory of the case, the defendants Portela, Manarite, Marti, and Frimet were the "core" conspirators in a scheme to distribute obscene materials through interstate commerce to retailers in various cities. Such materials included magazines, films and playing cards, all of which were either printed or produced in New York City. These items were then transported in interstate commerce and sold commercially by various retailers throughout the country. The petitioner, Ferris Alexander, was one of those retailers, operating a bookstore in Minneapolis.

The petitioner was in no way involved in the production of any of these materials. Nor did he actually transport or ship any materials, or in any way aid in their physical transmission. And the Government neither claimed nor proved that he knew or had any dealings with the other retailers to whom shipments were made; the other retailers were located in New York City, Baltimore, Philadelphia, Chicago, Cleveland, Richmond and Las Vegas.[2] Petitioner's role was in essence confined to being the purchaser and receiver of two large quantities of allegedly obscene magazines, *i.e.,* (1) 10,000 copies of *Adam and Eve,* received on March 18, 1969, and (2) 10,000 copies of *Kiss It Hard,* received on April 20, 1969. Those two separate ship-

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[2] In its brief in the Second Circuit, the Government stated at page 29 that "We do not contest the allegation that Alexander did not know the identity of the other retailers."

ments led to his conviction on two substantive counts, Counts 7 and 10.[3]

A. The Government's Conspiracy Evidence

Four of the Government's witnesses were participants in the charged conspiracy—Frimet, Del Rosso, Kelly and Valentine. Their testimony was said by the Government to have established a conspiracy in which Frimet supplied obscene magazines and playing cards, and Marti supplied obscene films. This material was distributed by Portela, through various runners including Del Rosso and Valentine, to retailers in the aforementioned cities throughout the country. Manarite acted as financier for the entire operation.

According to these witnesses, during the course of the operation Valentine made a series of three trips to Minneapolis. On at least two of these trips large numbers of some of the magazines in question were carried in a U-Haul trailer that Valentine had rented. The petitioner Ferris Alexander met with Valentine in Minneapolis on these occasions either to view, purchase or receive the magazines. And Valentine further testified that he had met the petitioner prior to these trips in a printer's office in New York City, where Portela then chanced to be, and overheard Portela say either to the petitioner or more likely to petitioner's

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[3] Because of a failure of proof, the District Court dismissed the Government's claims that petitioner had received 10,000 copies of a magazine entitled *Action* on February 1, 1969, and 1,000 copies of *Adam and Eve* on February 28, 1969. Moreover, the jury found petitioner not guilty on Counts 2 and 5, which charged that he had received a quantity of obscene playing cards in November of 1968, and 10,000 copies of *Adam and Eve* in February of 1969 (a time when the Government's own proof showed that these materials had not yet been printed).

brother (Edward Alexander) that he would be sending out to Minneapolis samples of hardcore material.[4] App. 351, 914-916. But there was no testimony whatever, by Valentine or any one else, that the petitioner himself ordered any material from Portela on this occasion or that he even encouraged Portela to send him any magazines or other items on approval. Whatever was said was said by Portela alone. The totality of this critical testimony by Valentine, on direct examination, was as follows (App. 351-352):

> Q. Mr. Valentine, prior to the meeting with Ferris Alexander in Minneapolis that you just related, had you ever met the gentleman before?
> A. Yes, I did. I met him in New York.
> Q. When was that?
> A. It was some time in January.
>
> * * * *
>
> Q. Where was the meeting, Mr. Valentine?
> A. Somewhere in Manhattan, at a printer's office.
> Q. Do you recall if anyone else was present at this meeting?
> A. Yes there was. Richard Portela and the printer and two people that were introduced as the Ferrises. [Note: Valentine obviously meant the Alexanders—Ferris and his younger brother Edward].
> Q. Did you have a conversation with anyone at this meeting?

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[4] At the trial, it was demonstrated that Valentine's testimony was contaminated with prior criminal convictions, blemished by perjury and prior inconsistent statements, and generally rendered untrustworthy by a desire on his part not to be punished for a number of crimes he admitted committing—such as armed robbery, grand larceny, assault and possession of a dangerous weapon. Moreover, he was not indicted for the transportation of obscene materials here involved. App. 435-436, 448-449.

A. Yes. Richard Portela introduced me to Mr. Ferris [Alexander] and told him I would be making trips out to him.

Q. Was there any conversation relating to what you would be taking out to Mr. Ferris [Alexander]?

A. Yes. He [Portela] said he had a new line of hard core material that he would be sending out—sending him samples.

Q. Who said that?

A. Richard Portela.

Q. To whom did he say that?

A. Mr. Alex.

Q. Did you hear him say that?

A. Yes, I did.

On cross-examination, however, Valentine admitted (Tr. 915) that he had given the following sworn testimony before the grand jury:

Q. And did you have any conversation or did Portela have any conversation with the [Alexander] brothers at that time?

A. Yes, he said that he was telling the younger Ferris [sic] brother that he had a new line of books and films coming out, that he would send him samples.

The younger brother, Edward Alexander, also operated a bookstore in Minneapolis. Valentine knew him to be petitioner's younger brother. Edward Alexander was indicted in this case, but the Government secured his severance from the trial.

Thus the Second Circuit simply misread the record when it later stated in its opinion that this testimony of Valentine showed that the petitioner, Ferris Alexander, "came to New York from Minneapolis and ordered some hard core materials from Portela, and

Portela told Alexander that he would send him these materials." Appendix hereto, p. 5a, *infra*. And the Court was likewise in error in stating that "On the basis of this evidence, the jury could have concluded that [petitioner] Alexander ordered the material (or at least encouraged Portela to bring it to him on approval) before the material was in fact brought into the state [Minnesota]." Appendix hereto, p. 5a, fn. 5, *infra*. There was simply no evidence that the petitioner or his brother ordered any material or encouraged the sending of samples at this New York meeting in January. And there was nothing said by Portela or anyone else that linked Portela's references to possible shipments and samples to the two shipments that were made to petitioner in March and April. These errors were brought to the court's attention in the petition for rehearing, which was denied without comment.

Another Government witness, an undercover FBI agent, testified that he had talked with petitioner on several occasions in Minneapolis and had observed him behind the counter in a bookstore in that city. And there was some evidence that petitioner had returned some unwanted films to Portela.

B. The Government's Other Evidence

The Government asserted in its brief to the Second Circuit (p. 35) that the evidence supporting petitioner's conviction of the substantive charge in Count 7 showed that "Valentine took 10,000 copies of the magazine 'Adam & Eve' to Minneapolis; that Valentine received $250 from both Portela and Wolf for expenses; that Valentine delivered these magazines to [petitioner] Alexander and was paid approximately $10,000; and that Valentine was paid $500 for this trip by Richard Portela when he returned to New York (App. 352-361)."

As to Count 10, that Government brief (pp. 35-36) asserted that "the evidence showed that Valentine took about 10,000 copies of the magazine 'Kiss It Hard' to Minneapolis; that he was paid by both Portela and Wolf as expenses for this trip; that Valentine delivered these magazines to [petitioner] Alexander; that Alexander said that he had wired the money ahead to Portela and that he had some films that he wanted to return; and that Valentine was paid $500 for this trip by Portela when he returned to New York (App. 361-368)."

It should be noted that the Government neither claimed nor proved that the petitioner ever knew beforehand what magazines were being delivered to him on any of these Valentine visits to Minneapolis. Petitioner was in fact shown samples on each occasion in Minneapolis before accepting the magazines and only then did he decide whether to purchase them.

C. The Court of Appeals Decision

On the appeal, the Second Circuit affirmed all convictions, including petitioner's, and found that there "was ample evidence to support the conviction of each of the appellants of each of the counts of which they were convicted." See Appendix hereto, p. 8a, *infra*. In so affirming, the court made the following specific rulings respecting petitioner's claims:

(1) The District Court's charge to the jury respecting the elements of obscenity was found proper. That charge had included children within the relevant community from whence community standards were to be determined; and it had contained a special reference to appeals to the prurient interest of sexual deviates despite the absence of proof that the dominant theme

of the materials was designed for any such group of deviates or that the materials were primarily disseminated to such a group.

(2) The Second Circuit approved the District Court's rejection of petitioner's proffer of magazines of similar nature to those here involved which were available and had been easily purchased in Los Angeles and other major metropolitan areas. This proffer had been made on the issue of community standards.

(3) The Second Circuit rejected petitioner's contention that 18 U.S.C. § 1465 violates the First and Fifth Amendments in that (a) it interferes with a protected individual right to receive allegedly pornographic material, and (b) it creates an irrational presumption that the transportation of two or more copies of any publication indicates that such publication is intended for sale or distribution (there being no proof here that petitioner distributed or intended to distribute the magazines in question).

(4) Also rejected by the Second Circuit was petitioner's claim that under 18 U.S.C. § 1465 he was entitled to an instruction that the Government must prove beyond a reasonable doubt that he knew the obscene nature of the publications before the interstate shipment commenced.

(5) The Second Circuit held that petitioner had properly been convicted of the conspiracy charge despite the absence of proof that he knew of the nature or scope of the conspiracy or the identity of the other retailers. In the court's words, "it is obvious that [petitioner] Alexander *must have known* that this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portela in New York and

must have been aware of the nature and extent of the conspiracy and its operation." See Appendix hereto, p. 9a, *infra;* emphasis added.

(6) Finally, the Second Circuit held that petitioner had properly been convicted under the substantive counts for having transported in interstate commerce certain obscene materials, in violation of § 1465. In so holding, the court stated that it had "no occasion to consider the application of § 1465 to cases where a person has no connection with those transporting material in interstate commerce until after the material was brought into the state." Appendix hereto, p. 5a, fn. 5, *infra.* Rather, said the court, the evidence here was such that the jury "could have concluded that [petitioner] Alexander ordered the material (or at least encouraged Portela to bring it to him on approval) before the material was in fact brought into the state and thus the evidence was clearly sufficient as to the convictions . . . on Counts Seven and Ten relating to the March and April trips to Minneapolis respectively." *Ibid.* But see pp. 7-8, *supra.*

REASONS FOR GRANTING THE WRIT

1. The Decision Below, in Its Affirmance of Petitioner's Conspiracy Conviction, Conflicts With Kotteakos v. United States, 328 U.S. 750.

This Court's decision in *Kotteakos* v. *United States,* 328 U.S. 750 (1946), is a landmark in the development of federal conspiracy law, constituting a warning against loose and indiscriminate conspiracy prosecutions. The decision of the Second Circuit in the instant case, affirming petitioner's conviction on just such a loose and indiscriminate conspiracy charge, is in direct conflict with the *Kotteakos* ruling and the principles therein established.

At issue here, as in *Kotteakos,* is the so-called "wheel" conspiracy charge. The core or hub of the *Kotteakos* conspiracy wheel was an individual named Brown, who served as a broker obtaining FHA-insured loans for various other persons through the supplying of false information to the lenders. There were at least eight such loan applicants, none of whom had any connection with each other; each of them dealt independently with Brown in perpetrating the respective loan frauds. Thus, as the Court put it, "the pattern was 'that of separate spokes meeting at a common center,' though we may add without the rim of the wheel to enclose the spokes." 328 U.S. at 755. The critical holding in *Kotteakos* was that each of those at the end of the "separate spokes" had the right "not to be tried *en masse* for the conglomeration of distinct and separate offenses as shown by this record." 328 U.S. at 775.

A similar "wheel" with "separate spokes" extending outward, with no rim enclosing the spokes, existed in this case. The core or hub of the alleged single conspiracy consisted of the makers and distributors of the obscene materials in New York City. Their runners or delivery men constituted "separate spokes," traversing interstate lines outward to deliver the materials to individual retailers in various cities throughout the United States. None of these retailers knew each other, and each dealt separately with one or more of the "core" individuals or their agents in purchasing these materials. Thus, as in *Kotteakos,* there was no "rim of the wheel to enclose the spokes." And, like the individual loan applicant in *Kotteakos,* the petitioner had the right, as an individual retailer who dealt separately with the "core," not to be tried jointly as a

co-conspirator with the other individuals constituting the wheel. The teaching of *Kotteakos* is that it is unfair to visit upon petitioner the sins involved in all the other separate interstate transmissions of obscene material to unrelated retailers. Only by a severance could petitioner avoid being judged by a mass of evidence that was totally unconnected with him.[5]

In rejecting the *Kotteakos* precedent in this case, the Second Circuit placed reliance instead on *Blumenthal* v. *United States,* 332 U.S. 539 (1947). See Appendix hereto, p. 9a, *infra.* But in the circumstances, such reliance indicates either a mistrust of the *Kotteakos* ruling or a misreading of *Blumenthal.* The situation in *Blumenthal* was quite unlike that here or in *Kotteakos.* Involved there was an overriding scheme among agents and salesmen of a liquor distributor to aid that distributor in selling whiskey unlawfully. All of the agents and salesmen had an agency-type relationship with the distributor, knew of the scheme, desired to aid the distributor in the unlawful scheme, and acted separately only in the sense that each sold only his share of the whiskey lots. It was in that context that the Court commented that, while the salesmen may not have known each of the other salesmen, they "knew or must have known that others unknown to them were sharing in so large a project."

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[5] Thus of the 39 witnesses who testified for the Government over a four-week trial period, 35 never mentioned petitioner's name. And out of 1500 pages of trial transcript, less than 100 related to petitioner. Moreover, the jury viewed about 44 films alleged to be obscene, none of which were distributed to or sold by the petitioner. The effect of this unrelated evidence on petitioner's case was devastating and irreparable. Every attempt to secure a severance or to have the jury instructed to view petitioner's case separately was rebuffed by the trial judge. App. 23, 1217, 1107.

332 U.S. at 558. And by their separate agreements with the distributor, they became parties to the larger common plan, though the exact limits of the plan may have remained unknown to them. It was that type of comprehensive plan that was held to justify a single conspiracy prosecution. 332 U.S. at 559.

The Second Circuit attempted to tie petitioner in with a *Blumenthal*-type scheme. It did so by assuming, without any kind of supporting proof, (1) that he *must have known* that the material being delivered to him in quantities of 10,000 copies "was also being distributed to other dealers," and (2) that he *must have been aware,* by virtue of having "visited Portela in New York," of "the nature and extent of the conspiracy and its operation."[6] All of these assumptions

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[6] The Government's brief in the Second Circuit detailed (pp. 29-30) the wholly inferential nature of petitioner's role in this transportation scheme:

> "... the nature of the enterprise clearly justified the inference that [petitioner] Alexander knew of the existence of others in one overall conspiracy. Thus, the scheme here involved the distribution of obscene magazines, playing cards, films, and the like. Alexander, as a retailer, must have known that the publishers and distributors did not (indeed, most likely, could not) exist only to serve him and, in fact, were serving others. Moreover, where the material was shipped interstate to him, it is reasonable to expect him to know or anticipate that such material is also being shipped interstate to other locations. Thus, we submit that Alexander must have known that the 'core' conspirators were dealing with other retailers in other states and the inference that he knew the scope of the conspiracy is justified. Compare *Blumenthal* v. *United States,* 332 U.S. at 558.
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> "The evidence also establishes that here, unlike in *Kotteakos,* Alexander was interested in transactions other than his own. We note that the proof in the instant case established not one transaction involving Alexander, but several. From this it can reasonably be inferred that Alexander and the 'core' conspirators had entered into some sort of a supply agreement and

were derived from a record that showed only that petitioner received two large shipments of obscene material in Minneapolis and that he was present in New York at a printer's office when Portela may have made some unspecified and general remarks about orders or perhaps sending some samples to Minneapolis. See pp. 7-8, *supra*. The Second Circuit, following the suggestion of the Government, has combined these few shreds of evidence with an overly-generous amount of "he must have knowns" to erect an elaborate *Blumenthal*-type of conspiratorial scheme. By use of vivid imagination and unwarranted assumptions, the petitioner has been transformed from an ordinary retail purveyor of this allegedly obscene material into a vital cog in a vicious nationwide distribution scheme, possessed of complete awareness of all the machinations of the conspiracy.

Neither *Blumenthal* nor any other decision of this Court justifies such a cavalier disregard of the failure of proof or such a substitution of judicial and prosecutorial imagination. A conspiracy, like any other crime, must be proved in its essential details beyond a reasonable doubt by relevant and admissible facts, even giving due regard to the inferences that may legitimately be drawn from established facts relative to such matters as intent and knowledge. But proof of a *Blumenthal*-type conspiratorial plan cannot rest on inference alone; the *Blumenthal* opinion itself reveals a wealth of estab-

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that the 'core' conspirators had come to rely upon Alexander as an outlet for their 'goods' . . . . By acting as a distributor of the 'product' of the conspiracy, with knowledge of its scope, Alexander actively assisted the conspiracy in the furtherance of its objective. . . . While immediately concerned with his own transactions, he had a definite interest in the other transactions. Thus, his success in receiving a continuing supply of pornographic materials was directly dependent upon the success of the publishers and distributors."

lished facts underlying the few inferences there made. See 332 U.S. at 543-546, 549-550, 553-556. Yet there is virtually nothing more than inference and assumption used to establish petitioner's participation in and knowledge of such a plan in this case.

Indeed, the factual underpinnings of petitioner's involvement in this alleged conspiracy are so thin that the controlling principle may well be one of constitutional dimensions—*i.e.*, the principle that the Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); and see *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *Turner* v. *United States*, 396 U.S. 398, 430 (1970) (Black, J., dissenting).

2. Important Questions Are Raised as to the Proper Interpretation and Application of § 1465.

Section 1465 of Title 18 quite simply provides that "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution" any obscene matter shall be subject to penal sanctions. The Second Circuit has affirmed petitioner's conviction for having violated that provision (Counts 7 and 10) on the theory that petitioner, either by ordering obscene magazines or by encouraging the sending of obscene magazines for approval, knowingly induced or caused a subsequent illegal transportation in interstate commerce.[7] Appendix hereto, p. 5a, fn. 5, *infra*.

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[7] The Government's brief in the Second Circuit argued (p. 55) that "it can be concluded that [petitioner] Alexander, with knowledge of the nature of the materials, induced their interstate transportation for the purpose of sale or distribution" and that "[i]t is reasonably inferable from the facts that Alexander ordered this material, thus inducing the commission of the crime."

To begin with, there is absolutely no evidence showing that petitioner either ordered the magazines or encouraged the sending of samples that resulted in the two specific interstate shipments received on March 18, 1969, and April 20, 1969, which were the only subjects of the charges in Counts 7 and 10 as to which petitioner stands convicted.[8] Indeed, there is no evidence that he ever ordered any magazines or encouraged the sending of any samples prior to their shipment to and receipt in Minneapolis. See pp. 7-8, *supra*. For this reason alone, the conviction as to Counts 7 and 10 must fall. See *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

But if we accept the erroneous factual premise of the Second Circuit's ruling, a most important problem of statutory construction arises. The Government was frank to concede in its brief below (p. 53) that § 1465 "is not concerned with a mere receiver of obscene materials which have been transported in interstate commerce." And the Second Circuit carefully noted (Appendix hereto, p. 5a, fn. 5, *infra*) that it was not considering "the application of § 1465 to cases where a person has no connection with those transporting material in interstate commerce until after the material

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[8] The petitioner was in New York in January 1969, at which time it is erroneously said that he either ordered some unspecified magazines or encouraged the sending of some unspecified samples. Thereafter, the Government claimed, a series of interstate shipments ensued. Petitioner allegedly received such shipments on February 1, February 28, March 18 and April 20, 1969. Only the last two shipments were involved in Counts 7 and 10. As to the February shipments, petitioner either was found innocent by the jury or secured dismissal of the charges. There was no proof whatever that petitioner's alleged ordering in January related specifically to the March 18 or April 20 shipments. See the relevant testimony set forth at pp. 7-8, *supra*.

was brought into the state." The court's opinion followed that statement with a "cf." citation to *Rewis* v. *United States*, 401 U.S. 808 (1971).

If a mere receiver of obscene materials shipped in commerce cannot be said to have knowingly transported those materials within the meaning of § 1465, however, can it be said that a receiver is within § 1465 merely because he ordered, encouraged or foresaw the interstate shipment? Most receivers, particularly of the commercial type here involved, make some sort of arrangement before a shipment is made to them; and it is reasonable to say that they can foresee or anticipate an interstate shipment being made to them in order to execute their orders. In that sense, they can be said to induce such shipments. But to say that for § 1465 purposes they cause or induce the interstate shipment, or aid and abet in such movement, so as to be guilty of knowing transportation of obscene materials, is to read back into § 1465 the one person who is concededly excluded—the "mere receiver." Such a perversion of the plain meaning of § 1465 is underscored by the absence of any statutory language covering those who "cause" an illegal transportation or who "receive" obscene materials by interstate transportation.

The Second Circuit's citation of *Rewis* v. *United States,* 401 U.S. 808 (1971), actually serves to emphasize the impermissible nature of that court's exercise in statutory construction. The *Rewis* case dealt with the Travel Act, 18 U.S.C. § 1952, which prohibits interstate travel with intent to promote or carry on certain criminal activities, including gambling. This Court there rejected the Government's construction of the Travel Act that would have created a violation

"whenever the operator of an illegal [gambling] establishment can reasonably foresee that customers will cross state lines for the purpose of patronizing the illegal operation." 401 U.S. at 812-813. The Court said that "it will almost always be reasonable to say that the operators of the establishment could have foreseen that some of their customers would come from out of state," but foreseeability was held not to govern criminality under § 1952 without some express legislative intent or language. 401 U.S. at 813. Such a construction of the Travel Act contains an obvious lesson for construing the obscenity transportation law, § 1465—*i.e.*, the receiver whose actions make it reasonable to foresee an interstate shipment of obscene materials can no more be held to be a transporter in commerce than can a gambling establishment's operations constitute that establishment as an interstate traveler merely because it can foresee that it will attract interstate business.

The *Rewis* decision has an additional and perhaps even more important lesson for those who must interpret § 1465. While the Court in *Rewis* did not deem it necessary to pass upon the Government's additional construction of the Travel Act that would have created a violation "whenever the operator actively seeks to attract business from another State," the Court intimated that such a construction might be justified only where "the conduct encouraging interstate patronage so closely approximates the conduct of the principal in a criminal agency relationship that the Travel Act is violated." 401 U.S. at 814. The relevance of that *Rewis* comment to the interpretation of § 1465 is obvious. The gambler who actively solicits or seeks to attract interstate business is conceptually

like the retailer who actively seeks to purchase obscene materials that will have to be transported to him through interstate commerce. The *Rewis* statement teaches that such an obscene material purchaser could be held to be an interstate transporter only if the purchaser's conduct "so closely approximates the conduct of the principal [transporter] in a criminal agency relationship" that § 1465 is violated. Needless to say, merely placing an order or soliciting samples is no indication that the purchaser has entered a "criminal agency relationship" with those who actively transport the obscene material.

It is important to note when Congress means to punish the recipients of obscene material it makes that intention crystal clear. Section 1465, as indicated, contains no language reflective of such an intention. But three sections of Title 18 that are closely related to § 1465 do contain provisions that outlaw the receipt of obscene materials through various means:

(1) Section 1461, which proscribes the mailing of obscene matter, specifically punishes anyone who "knowingly takes any such [obscene] thing from the mails for the purpose of circulating or disposing thereof."

(2) Section 1462 outlaws the knowing use of any express company or other common carrier for carriage in interstate or foreign commerce of any obscene material. But it also imposes penal sanctions on anyone who "knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful."

(3) Section 1463 declares unmailable any envelope or wrapper or postal card on which obscene language

or characters appear. It then prescribes penalties not only for those who knowingly deposit such items for mailing but also for those who "knowingly take the same from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same."

And it is equally apparent that when Congress intends to punish not only those who transport some illegal article in commerce but those who cause or induce such transportation, it makes that intention clear. Thus in 18 U.S.C. § 2314, dealing with the transportation in commerce of stolen goods, Congress has imposed sanctions on "whoever transports" such goods as well as "whoever causes to be transported, or induces" the transportation. See also 18 U.S.C. § 2312, which punishes one who "transports in interstate or foreign commerce" a stolen vehicle, and the entirely separate provision, 18 U.S.C. § 2313, punishing one who "receives" such a stolen vehicle.

The conclusion is inescapable, particularly in the absence of specific language in § 1465 respecting receipt or causing or inducing transportation, that Congress meant precisely what it said in § 1465. Only the person who in a realistic sense "knowingly transports in interstate commerce" obscene materials is to suffer the penalties of § 1465. Left to the hazards of other federal and state laws is the one who causes the transportation to be made or who receives such material from the channels of commerce and thereafter distributes the material commercially.

The Second Circuit's erroneous interpretation and application of § 1465 deserve review and correction by this Court. That interpretation contravenes a variety

of statutory construction concepts, including the established principle that criminal statutes are to be narrowly construed. And as obscenity prosecutions proliferate throughout the federal system, it is necessary that the courts, the prosecutors and the accused individuals be properly advised as to the correct scope of this important anti-obscenity weapon.

3. Important and Recurring Problems Are Raised as to Standards and Procedures To Be Employed in Obscenity Prosecutions.

The decision of the Second Circuit further merits review by this Court by virtue of its disposition of several important problems, both substantive and procedural, of concern to many if not most obscenity prosecutions. These problems have been adverted to but never definitively resolved by this Court. To wit:

(1)

Is the accused entitled to seek to establish "contemporary community standards" through the introduction of readily available publications similar to those in issue? The Second Circuit responded in the negative, holding that such similar material is not admissible in the absence of proof, through expert witnesses, that the similar material "enjoys a reasonable degree of community acceptance." See Appendix hereto, p. 15a, *infra.*

But the critical assessment of "contemporary community standards" and of "a reasonable degree of community acceptance," under our system of law, is to be made by the jury, not by expert witnesses. The jury is entitled to as much help as can be given through expert witness testimony and through any other rele-

vant evidence. As was said by Mr. Justice Frankfurter, concurring in *Smith* v. *California,* 361 U.S. 147, 165 (1959), in so determining community standards, "it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are."

What is acceptable in a community would appear to have a rational relationship to what the standards of the community may be, and to exclude such evidence of available and accepted material can only serve to make the jury's determination less trustworthy and less objective. A definitive answer to this recurring problem should be supplied now. See *Miller* v. *California,* No. 70-73, probable jurisdiction noted, 401 U.S. 992, which poses to this Court the question whether the relevant community is "statewide" in nature.

(2)

Should the jury be instructed that children and the young must be included in the community whose contemporary standards are in issue? The Second Circuit approved such an instruction on the theory that the instruction in this case made it clear that the community as a whole—including children, adults, young, old, educated and uneducated, religious and irreligious—was to be considered. No undue emphasis on children was thought to be involved. See p. 14a, *infra.*

But this Court has made it plain that the standards of obscenity are not determinable by what is acceptable for children, who are among the most susceptible in the community. *Butler* v. *Michigan,* 352 U.S. 380 (1957); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58

(1963). It would seem to follow that juveniles are not part of the relevant community in determining whether certain adult-oriented material is nonacceptable and hence obscene. Upon hearing children mentioned in this context, some jurors might well think it proper to determine the community standards on the basis of "Would I want my children to read this material?" That possibility suggests the impropriety of the jury instruction in this case, and the need for clarification of the matter by this Court, in light particularly of its *Butler* decision.

(3)

Is it proper to instruct the jury that it may consider the prurient appeal of the material to sexual deviates when there is no proof that the dominant theme of the material was "designed for a clearly defined sexual group"? The Second Circuit answered in the affirmative on the theory that since a small part of the material related to deviate practices it was proper to consider that the "probable recipient group" consisted of deviates.

The error here seems plain. This Court held in *Mishkin* v. *New York,* 383 U.S. 502, 508 (1966), that only when "the material is designed for *and primarily disseminated to a clearly defined deviant sexual group,* rather than the public at large, the prurient-appeal requirement of the *Roth* test is satisfied *if the dominant theme of the material taken as a whole* appeals to the prurient interest in sex of the members of that group." Emphasis added.

Since there was no proof or claim here that the material transported across state lines was to be "pri-

marily disseminated to a clearly defined deviant sexual group," and since there was no proof or claim that "the dominant theme of the material taken as a whole" appealed to any such group, the decision below is in flat conflict with *Mishkin*.

(4)

The final question raised is whether, in a prosecution under 18 U.S.C. § 1465, the jury must be instructed that the defendant must know that the material is obscene before it is transported across state lines. Or is it enough if he learns of the obscene nature after the material has crossed state lines?[9]

The answer must lie in the language of § 1465 penalizing one who "knowingly transports in interstate or foreign commerce" any obscene material. It would seem plain that, to contravene this statute, one must know beforehand that the articles one has allegedly transported are obscene in nature. Just as a bookseller can constitutionally be convicted of selling an obscene book only if he knows beforehand that the book is obscene, *Smith* v. *California,* 361 U.S. 147, 152-153 (1959), so too the constitutionality of § 1465 must in part rest on a requirement that scienter precede the formalistic transportation. Otherwise § 1465 would tend to restrict the free flow of printed material, for if a retailer is criminally liable for the transportation

[9] The actual charge here given (App. 739-740) read: "The third element is that the defendant knew the material was obscene and intended them to be transported in interstate commerce for the purpose of sale or distribution. This simply means that the defendant must act knowingly, that is, consciously, voluntarily, deliberately, purposely, and not because of mistake or inadvertence or other innocent reason." But the judge refused to charge that knowledge as to obscenity must precede the transportation.

of material he has never seen—but which is later found obscene—he will tend to restrict his orders to those materials he has previously inspected. To use the words of the *Smith* opinion, the Government will then "have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U.S. at 153.

CONCLUSION

For these various reasons, certiorari should issue to review the judgment and opinion of the Second Circuit in this case.

Respectfully submitted,

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September 15, 1971

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 810-814—September Term, 1970.

(Argued May 6, 1971 Decided July 7, 1971.)

Docket Nos. 35606, 71-1014, 71-1045,
71-1046, 71-1047

UNITED STATES OF AMERICA, *Appellee*,

v.

SAMUEL F. MANARITE, RICHARD PORTELA, LUIS MARTI, FERRIS JACOB ALEXANDER and DOMINICK CONSTANTINO,
Defendants-Appellants.

Before:

LUMBARD, SMITH and KAUFMAN, *Circuit Judges.*

Defendants appeal from judgments of conviction in the Southern District for violation of 18 U.S.C. § 1465 and 18 U.S.C. § 371, transportation and conspiracy to transport obscene material in interstate commerce, Lloyd F. MacMahon, *J.*, and a jury.

Affirmed.

RICHARD E. LINDSAY, United States Department of Justice, Washington, D. C. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, New York, of counsel), *for the appellee United States of America.*

WILLIAM S. ELLIS, New York, New York, *for defendant-appellant Samuel Manarite.*

JAMES M. LA ROSA, New York, New York (Gerald L. Shargel, New York, New York, of counsel), *for defendant-appellant Richard Portela.*

PATRICK M. WALL, New York, New York, *for defendant-appellant Luis Marti.*

HERALD PRICE FAHRINGER, Buffalo, New York (Lipsitz, Green, Fahringer, Roll, Schuller and James, Buffalo, New York and Robert Millavetz, Minneapolis, Minnesota, of counsel), *for defendant-appellant Ferris Jacob Alexander.*

MICHAEL P. DIRENZO, New York, New York, *on behalf of defendant-appellant Dominick Constantino.*

LUMBARD, *Circuit Judge*:

Samuel F. Manarite, Richard Portela, Luis Marti, Ferris Alexander and Dominick Constantino appeal from judgments of conviction following a 15-day trial in the Southern District of New York before Hon. Lloyd F. MacMahon, which resulted in jury verdicts against them on October 28, 1970. The appellants were all convicted of conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 1465 (transportation in interstate commerce of obscene material for purpose of sale or distribution) and on other counts of the 13 count indictment which charged substantive violations of § 1465.[1] Manarite was sentenced to eighteen months in prison, and fined $5,000; Portela was sentenced to three years in prison and fined $30,000; Marti to two years

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[1] 18 U.S.C. § 1465 provides in part:

"Whoever knowingly transports in interstate . . . commerce for the purposes of sale or distribution any obscene . . . book . . . or any other matter of indecent or immoral character, shall be fined not more than $5000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication [or article] . . . of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable . . . ."

in prison and fined $15,000; Portela to three years in prison and fined $30,000; Constantino received a year and a day and a $5,000 fine, while Alexander was sent to prison for eighteen months and fined $20,000; and Constantino received a year and a day and was fined $5,000.[2]

The appellants assert numerous claims of error which we treat as follows:

I. The Sufficiency of the Evidence

II. Alleged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

III. Alleged Errors Relating to the Determination as to the Pornographic Nature of the Material

IV. Evidence Seized Incident to Portela's Arrest

V. Use of Hearsay Evidence Before the Grand Jury

VI. Constitutionality of § 1465

As we find that there was more than ample evidence to support the convictions, and no reversible error in the conduct of the trial, we affirm the convictions.

I.

The Sufficiency of the Evidence

During the three week trial, the government advanced abundant evidence from which the jury could find that

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[2] Alexander and Portela were convicted on Counts Seven and Ten (relating to transportation between New York and Minneapolis of 10,000 copies of "Adam and Eve" and "Kiss it Hard" magazines, respectively). Portela was also convicted on Count Twelve (relating to transportation of 1,000 copies of "Color Climax" magazine from New York to Baltimore) and, along with Marti, on Count Thirteen (transportation of certain films from Ney York to Baltimore). Three defendants were acquitted in all respects: Salvatore Puntasecca, Max Bornstein and Carol Portela, wife of appellant Richard Portela. References to "Portela" unless otherwise indicated are to Richard Portela.

the appellants were guilty of the conspiracy, as charged, to produce hard core pornography in New York and distribute it to various cities, including Richmond, Philadelphia, Minneapolis, Cleveland, Washington, D. C., Chicago and Baltimore, and of the substantive offenses of which they were convicted. The evidence, which included testimony by four witnesses who were active participants, may be summarized as follows: Films were produced in Manhattan by Marti, who owned a shop known as the "Camera Eye" located at 12 West 21st Street, and the magazines and other printed matter were produced by Phil Frimet, the owner of "Anchor Litho" printing shop on 12th Street, in Manhattan, with the exception of one magazine which Frimet arranged for a sub-contractor to print. Frimet testified fully as to the nature of his activities. Portela distributed the material thus produced and employed various persons to assist him in this operation. Bruce Valentine and Frank Del Rosso testified at length as to trips which they made alone or with other co-conspirators for the purpose of selling and delivering the material in question for Portela and Marti. Manarite was the financier of the group. Alexander was a Minneapolis dealer who purchased material from Portela and Marti, and caused it to be transported in interstate commerce for commercial distribution.

The events recounted at the trial began in September or October, 1968, with the purchase by Frimet of "Anchor Litho." Initially, Frimet produced obscene playing cards which were purchased by Portela and defendant Paul Wolf.[3] Constantino picked up these cards from Frimet on behalf of Portela and Wolf. In December, 1968, Portela engaged Bruce Valentine to assist him in distributing

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[3] Prior to trial upon the government's motion, the case was severed as to six defendants, and of these Phil Frimet and Frank Del Rosso pleaded guilty to the conspiracy count and testified as government witnesses.

the material which he was ordering from Frimet and Marti. Portela and Valentine went to Philadelphia and Baltimore for the purpose of selling "Action," an obscene magazine printed by Frimet. Soon thereafter, Portela and Valentine went to Cleveland to sell certain hard core films which Constantino had transported to that city. During this trip, Portela told Valentine that Marti was the only producer of hard core films in Manhattan. Then, in February, Valentine and Constantino only, made a third trip to Baltimore and Philadelphia, for the purpose of selling films, playing cards and books. Valentine described the material as consisting of depictions of men and women engaged in sexual activities, apparently similar to the mass of materials admitted into evidence.

In January, 1969, Ferris Alexander,[4] came to New York from Minneapolis and ordered some hard core materials from Portela, and Portela told Alexander that he would send him these materials. In February, Valentine and Carol Portela drove to Minneapolis with a U-Haul trailer and delivered 10,000 copies of "Adam and Eve" magazine, another Frimet production. Valentine picked up the material in Manhattan at the Casco Bindery, an establishment owned by one Herb Goldwasser, assisted by Constantino, Frimet, Bornstein, Portela and Wolf. Subsequently, in March, 1969, Valentine delivered an additional 10,000 copies of "Adam and Eve" to Alexander and in April 10,000 copies of "Kiss it Hard," still another product of the Frimet establishment, were delivered, part of a run of 30,000 copies of that title printed in April.[5] On the

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[4] Unless otherwise indicated "Alexander" refers to the appellant Ferris Alexander. His brother, Edward Alexander, was named as a co-defendant but his trial was severed from that of the appellants.

[5] On the basis of this evidence, the jury could have concluded that Alexander ordered the material (or at least encouraged Portela to bring it to him on approval) before the material was in fact brought into the state and thus the evidence was clearly sufficient as to the convictions of Alexander (as well as Portela) on Counts

last occasion Alexander gave Valentine about one thousand films with which he was dissatisfied and asked that they be returned to Portela for credit. When Valentine gave these films to Portela, Portela said that the films came from Marti and not from him. The next day, Portela told Valentine that he was flying to Minneapolis with Bob Shuttlesworth, Marti's bookkeeper, to settle the matter.

Additional copies of various issues of "Kiss it Hard" were sold by Frimet and Constantino during a sales trip to Baltimore. "Kiss it Hard", unlike other magazines printed by Frimet, was produced on a partnership basis with Portela. In other cases, Portela and Wolf paid Frimet in cash.

In April, 1969, Del Rosso was engaged by Portela to assist in delivering pornographic materials. Del Rosso testified that, in persuading him to do this work, Portela told Del Rosso that Lou Marti was Portela's supplier of films. That same month, Del Rosso and one Owen Osterman rented a U-Haul and a truck for a sales trip to Baltimore, Washington, D. C., Philadelphia and Virginia. Among the items sold on this trip was "Adam and Eve." Del Rosso went to "Camera Eye" where Marti gave him additional books and magazines for the trip which he was about to undertake. In any event, Portela told Del Rosso that all sales made on his trip should be made on a cash basis if possible, and otherwise checks were to be made out to Lou Marti's "Camera Eye." Subsequently, Del Rosso made a sales trip to Minneapolis.

At about this time, Valentine spoke to Marti about purchasing films from him which he said he would try to

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Seven and Ten relating to the March and April trips to Minneapolis respectively. We have no occasion to consider the application of § 1465 to cases where a person has no connection with those transporting material in interstate commerce until after the material was brought into the state. Cf. *Rewis* v. *United States*, 401 U.S. 808 (April 5, 1971).

sell in Baltimore. Marti refused to sell films to Valentine for this purpose on the ground that he sold his films in Baltimore through Portela. However, Marti agreed to let Valentine purchase films for resale in Chicago, and supplied Valentine with a list of possible sales prospects in that city.

In late May, James Kelly,[6] who had just opened a book store in Baltimore, came to New York and purchased from Portela obscene playing cards, "Kiss it Hard" and "Tiny Tim," another magazine produced for Portela and Wolf by Frimet. A few days later Portela delivered some color film to Kelly in Baltimore. Shortly thereafter about 1,000 copies of "Color Climax" were sold to Kelly by Portela and they were delivered to Kelly by Manarite who fixed the price to be paid.

On June 25, the Baltimore police raided Kelly's shop and seized various obscene articles pursuant to a warrant. Copies of "Color Climax," "Kiss it Hard" and "Tiny Tim" were among the publications seized in this June 25 raid. Thereafter, Portela contacted Kelly by telephone and asked him if he wanted any new films. Kelly replied in the affirmative and then contacted the F.B.I. Portela registered in the Baltimore Holiday Inn under the alias "Nick Devito" were Kelly came to meet him on July 12. After two boxes of obscene films were transferred to Kelly's car, the Baltimore police arrested both Portela and Kelly, along with several others, and seized the films. Portela told Kelly over coffee after they had been released on bail, that Lou Marti supplied most of the films which had been the cause of their arrest, while a few films had come from one Lou Saks.

On July 23, Carol and Richard Portela were arrested in their apartment in Rego Park, New York, pursuant to

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[6] Kelly was indicted as a co-conspirator. His trial was severed and he testified for the government.

a warrant issued by a United States Commissioner, on complaint of an F.B.I. agent. Hard core pornographic materials were seized, along with a tear gas gun, a .32 caliber gun and various other items. Thereafter the appellants were indicted on October 27, 1969.

The magazines, playing cards, and films distributed by the conspirators were introduced in evidence. These materials graphically depict nude (or virtually nude) men and women, men and men and women and women engaged in various sexual acts, including sexual intercourse, fellatio, cunnilingus, sodomy and the like in numerous permutations and combinations. No attempt was made, or could be made, to suggest that any of this material constitutes instructional material on sexual technique, that it documents sex habits or that it has any social value. The evidence shows that the appellants themselves referred to this material as "hard core pornography," which is all that it is.[7]

Sufficiency of the Evidence

There was ample evidence to support the conviction of each of the appellants of each of the counts of which they were convicted.

Alexander argues that even if on two isolated occasions he may have committed substantive violations of § 1465, there is no proof that he was involved in a conspiracy to violate that section, or at least he was not proved to be part of the conspiracy charged. We do not agree. The conspiracy here shown was of the type sometimes referred to as a "wheel conspiracy" in that members of a "core" group deal with a number of contacts who are analogized to the spokes of a wheel and are connected with each other only through the core conspirators. In

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[7] See Mr. Justice Stewart's definition of the term "hard core pornography" in his opinion in *Ginzberg* v. *United States*, 383 U.S. 463, 499 n. 3 (1966).

such conspiracies, whether the spoke participants may be found to be members along with the core conspirators depends on whether or not the "spokes" knew or had reason to know of the existence, but not necessarily the identity, of one or more of the other spoke participants in the wheel conspiracy. Compare *United States* v. *Kotteakos,* 328 U.S. 750 (1946) with *United States* v. *Blumenthal,* 332 U.S. 539, 559 (1947).[8] See also *United States* v. *Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944).

On this record it is obvious that Alexander must have known that this material which was delivered to him in quantities of 10,000 copies at a time was also being distributed to other dealers. He visited Portela in New York and must have been aware of the nature and extent of the conspiracy and its operation. See *United States* v. *Aiken,* 373 F.2d 294 (2d Cir. 1967), cert. denied, 389 U.S. 833 (1967).

II.

Alleged Errors Involving Admission of Evidence Relating to Extrajudicial Statements of Co-Conspirators

Lou Marti argues that many of the statements admitted under the co-conspirator exception to the hearsay rule were improperly admitted. The testimony challenged includes the following:

(1) Valentine's testimony that Portela told Valentine that Marti had been the seller of certain films which

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[8] In *Kotteakos,* the convictions of persons accused of conspiracy to violate the National Housing Act were reversed because the only connection between the various persons involved was that each had made fraudulent applications to the same broker. However, in *Blumenthal,* the Supreme Court affirmed the convictions of salesmen involved in the illegal sale of liquor on the theory that each was "aiding in a larger plan."

were returned by Alexander to Portela via Valentine.

(2) Valentine's testimony that Portela told Valentine when they drove to "Camera Eye" that Portela was going to go into the shop to order films from Lou Marti.

(3) Agent McShane's testimony that Portela had an argument with Wolf during which Portela said that they should "let Lou Marti settle this."

(4) Del Rosso's testimony that Portela told Del Rosso that Portela obtained films from Marti.

(5) Valentine's testimony relating to his conversation with Marti wherein Valentine sought to purchase films for sale in Baltimore was rebuffed on the grounds that Portela sold Marti's films in Baltimore, but then was sold films for resale in Chicago and given a list of possible customers.

(6) Kelly's testimony that after he and Portela were arrested, Portela told Kelly that Portela obtained films from "Poncho" [Marti].

(7) Valentine's testimony that Portela told Valentine that Marti was the only producer of hard core films in Manhattan.

Also challenged as not within the scope of the conspiracy is Valentine's testimony that Portela told him that Manarite was financing the operation. Appellant contends that the above statements should have been excluded as either not in furtherance or not in the course of the conspiracy charged. We do not agree.

Statements of co-conspirators made in furtherance and in the course of a conspiracy are admissible as each of the conspirators is an agent of the other conspirators, and, therefore, such statements are evidence against all

those involved in the conspiracy. See *Lutwak* v. *United States*, 344 U.S. 604, 617-18 (1953); *Logan* v. *United States*, 144 U.S. 263 (1892); *United States* v. *Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964).[9]

The first challenged statement seems clearly to have been within the scope of the conspiracy. Alexander was seeking refunds from Portela on certain films for which Portela felt he was not responsible. It was necessary to clarify responsibility for these films in order to maintain Alexander's continued cooperation, and to do this Portela and Marti's bookkeeper promptly flew to Minneapolis. In order to avoid recurrence, Portela wanted Valentine to understand that he should not accept such returns. See *United States* v. *Annunziato*, 293 F.2d 373, 380 (2d Cir. 1961), cert. denied, 368 U.S. 919 (1961).

Similarly, the second challenged statement, relating to Portela's intent to buy films from Marti, made as Portela was about to go to the "Camera Eye," could be interpreted to be an attempt by Portela to acquaint Valentine with the practice of the conspirators so that Valentine would conform thereto.

The third statement, Portela's suggestion to Wolf that they let Lou Marti settle their dispute, is clearly in furtherance of the conspiracy because it was an attempt to find a means to insure its continuance, in the face of a serious disagreement between two of the key figures.

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[9] This rule is codified in the proposed Federal Rules of Evidence, Rule 801(d)(2)(v). Proposed Rule 801(d) provides in part:

> "(d) Statements Which Are Not Hearsay. A statement is not hearsay if:
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> . . .
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is . . . (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Number four, Portela's statement to Del Rosso that Lou Marti supplied the films could be considered as an inducement for Del Rosso to enter the conspiracy.

As to number five, Marti's statement that Valentine couldn't sell in Baltimore because that as Portela's territory obviously was in furtherance of the main conspiracy and was admissible on that basis regardless of whether Marti and Valentine had entered into any separate conspiracy. The fact that Marti agreed to allow Valentine to sell his films in Chicago and to furnish a list of possible customers in that city (in addition to suggesting that Marti had a stake in Valentine's venture), is not itself hearsay, since offered to prove the fact of agreement rather than the truth of any assertion relating to past or future agreement. Similarly, the testimony regarding possible purchasers in Chicago was clearly in furtherance of the conspiracy.

The sixth item, relating to Portela's statement that Marti was the only producer of hard core films in Manhattan, may well have been made in order to emphasize to Valentine the importance of Marti to the operation. Valentine, who previously had held Marti up at gun point, had not in the past shown proper deference to someone so important to the functioning of the conspiracy, and the jury might infer that Portela wished to avoid any repetition of this sort of conduct insofar as Marti was concerned.

Portela's identification of Marti as the supplier of the films seized in the July 12 shipment to Baltimore was made to Kelly after they both had been arrested and then released from custody. However, their arrest did not necessarily terminate the conspiracy. *United States* v. *Agueci*, 310 F.2d 817, 838-39 (2 Cir. 1962), cert. denied, 372 U.S. 959 (1963). Portela told Kelly in that same conversation that he intended to continue in the pornography business. In this context, his mention of Marti may

well have been to persuade Kelly to continue to deal with the conspirators, despite their arrests.

As to Portela's remark to Valentine that Manarite was financing the operation, this could have been for the purpose of suggesting to Valentine the need to show deference to certain figures in the conspiracy, in this case to Manarite, whom he was about to meet.

We find no error in the admission of this evidence.

III.

Alleged Errors Relating to the Determination of the Court and Jury as to the Pornographic Nature of the Material

The claims of the appellants relating to alleged errors in the Court's charge on obscenity, and the admissibility of certain evidence sought to be introduced on the issue of contemporary community standards, have an unreal quality in the light of the nature of the material described, and in the light of the use of the term "hard core" by the conspirators themselves in describing the material. In any event, the contentions of the appellants in this respect are entirely without merit.

Charge on the Elements of Obscenity

The Court, in charging the jury on the elements of obscenity, properly stated the applicable law. See *United States* v. *Roth,* 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966); *Redrup* v. *United States,* 386 U.S. 767 (1967); *Jacobellis* v. *Ohio,* 378 U.S. 184 (1964); *Mishkin* v. *New York,* 383 U.S. 502 (1966). The appellants, however, challenge two portions of the charge. The first portion challenged dealt with the determination of community standards:

> "In determining the common conscience of the community, you are to consider the community as a whole,

> young and old, educated and uneducated, the religious and irreligious, men, women, and children, from all walks of life, in all sections of the country."

We find no error in this charge. It makes it clear that the community as a whole is to be considered in determining what its standards are. It does not put any undue emphasis on the fact that children are part of this community. See *Butler* v. *Michigan*, 352 U.S. 380 (1957).[10]

A second portion of the charge complained of related to the small percentage of the material which might be deemed as appealing to persons with deviant sexual interests. The Court, after dealing with the general requirement that in order to be obscene material must have prurient appeal, stated:

> "Some of the material charged as obscene deals with sexual conduct that deviates from normal heterosexual conduct, such as lesbianism and homosexuality. Where the material is designed for a clearly defined deviate sexual group rather than to the public at large, the prurient appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group" (R. 1927).

It is claimed that this charge is deficient in that it fails to state that the special rule charged is applicable only

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[10] This charge puts slightly less emphasis on children in defining the nature of the community than did the charge in *Roth* v. *United States, supra*, which stated that:

> "[t]he community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community."

See *Ginzberg* v. *United States*, 383 U.S. 463, 465, n. 3 (1966).

if there is independent proof that the material was designed for and primarily disseminated to a clearly defined sexual group. This claim is without merit. Under *United States* v. *Mishkin, supra,* this variation of the prurient interest requirement applies where the "probable recipient group" consists of deviates. This would surely be true whenever, in the words of the charge "the material is designed for a clearly defined deviate sexual group."

Exclusion From Evidence of Comparable Material Offered on the Issue of Community Standards

The appellants sought to introduce evidence supposedly relevant on the issue of community standards. This evidence included materials purchased in Los Angeles which the defendants offered to prove were also available in other major metropolitan areas, material purchased in New York City, films showing in New York City and the Report of the Commission on Obscenity and Pornography.

The appellants do not contest that under *United States* v. *Wild,* 422 F.2d 34 (2d Cir. 1969), cert. denied, 402 U.S. 986 (May 17, 1971), it was not necessary for the government to introduce evidence on the issue of community standards in view of the "hard core" nature of the materials.

Of course, the appellants had the right to introduce evidence on community standards. The question is whether the evidence offered by the appellants was proper evidence on this issue. We conclude, as did the trial Court, that it was not.

Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *Womack* v. *United States,* 294 F.2d 204, 206 (D.C. Cir. 1961), cert. denied, 365 U.S. 859 (1961). Such proof would

normally be supplied by expert witnesses. No such proof was offered. In the absence of this foundation, the allegedly similar pornographic material was properly excluded. Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.

As to the Report of the Commission on Obscenity and Pornography, it was properly excluded as in large part irrelevant and as usurping the function of the jury. Introduction of such material is not a proper substitute for the testimony of expert witnesses whose opinions can be tested by appropriate cross examination.

IV.

Evidence Seized Incident to Portela's Arrest

Portela challenges the admission into evidence of certain items seized in his apartment on July 23, 1969, when he was arrested there pursuant to a warrant. His sole challenge to this search is that it was not conducted in accordance with the restrictive standards of *Chimel* v. *California*, 395 U.S. 752 (1969), decided one month earlier. We are in full agreement with Judge MacMahon's opinion denying Portela's motion to suppress this evidence. See *United States* v. *Manarite*, 314 F. Supp. 607, 613-16 (S.D.N.Y. 1970). A tear gas gun, a bag containing photographs and a bag containing ammunition were found in a bar within six inches of where Portela was standing at the time they were seized. Two address books and a bag containing what Portela described as "hard core" film was found on the bar. Additional matter including a gun and .32 caliber ammunition was found in closets to which the agents went at the request of Mrs. Portela to get for her a dress and a raincoat. Other material, including Western Union money order receipts and copies of "Color Climax" were found near an end table near which several unidentified persons were standing. The F.B.I. agents were

justified in assuming that these persons might be accomplices of those arrested and hence might attempt to destroy evidence or procure a weapon on behalf of appellants. This was an obvious possibility in view of the fact that a gun had already been found on the premises. Thus, as Judge MacMahon found, the search and seizure incident to the July 23 arrest was entirely within the scope of *Chimel.*

V.

Use of Hearsay Evidence by the Grand Jury

The indictment herein is challenged on the ground that it was based in part on hearsay testimony. The grand jury was shown the magazines and other printed material involved in this case, but was not shown the movies. Appellants' contention that the jury should have viewed some or all of the hundreds of films involved in this case is entirely unwarranted especially in view of the fact that the content of the films was described to them in competent testimony. See *Costello* v. *United States,* 350 U.S. 359, 363 (1956). There was no reason for the grand jury to view the films. They had a sufficient description of them and could call for their display if they felt it necessary to do so.

VI.

Constitutionality of § 1465

The appellants claim that, on its face, or as applied, § 1465 is unconstitutional, citing *Stanley* v. *Georgia,* 394 U.S. 557 (1969). However, the Supreme Court in *United States* v. *Reidel,* 402 U.S. 351 (May 3, 1971), upheld the constitutionality of § 1461 which forbids the mailing of pornographic material. The Supreme Court held that under *Roth* v. *United States, supra,* obscene materials are not protected by the First Amendment, and that the limited right to receive pornography established by

Stanley did not establish a corresponding right to sell such materials. *A fortiori,* it follows that § 1465, which specifically requires that the transportation in interstate commerce be "for the purpose of sale or distribution," is also constitutional.

Alexander also claims that § 1465 is unconstitutional because of the provision contained therein that the transportation of two or more copies of any publication or article or a combined total of five such publications or articles creates a presumption that such articles are intended for sale or distribution. Such a presumption is clearly valid as applied to this case where each delivery involved large numbers of magazines and/or films, usually in the thousands.

We have considered the other arguments raised by appellants and find them to be without merit.

The judgments appealed from are affirmed.